RECENT CASE NOTES

BILLS AND NOTES—DELIVERY OF INCOMPLETE INSTRUMENT—EXTENT OF AUTHORITY TO COMPLETE.—The defendants endorsed an accommodation note made "to the order of . . ." The person whose name the maker wrote into the blank as payee refused to discount the note. To effect a discount to the plaintiff, the maker therefore had the plaintiff add the words "or bearer." *Held* (two judges dissenting), that the plaintiff could not recover from the accommodation endorsers, as the insertion of "or bearer" was an unauthorized material alteration which avoided the note as to them under the Negotiable Instruments Law. *First Natl. Bank v. Wood* (1918, N. C.) 95 S. E. 140.

Negotiable paper completed before delivery to the accommodated party for purposes of negotiation falls under the general rule, and may not be altered. *Builders' Lime Co. v. Welmer* (1915) 170 Ia. 444, 151 N. W. 100. But where accommodation paper contains a blank for the name of the payee, the accommodated party is "presumed" to have authority to fill that blank for purposes of negotiation in any way consistent with the nature of a negotiable instrument. *Michigan Ins. Bank v. Eldred* (1870, U. S.) 9 Wall. 544; *Bank of Spartanburg v. Mahon* (1906) 75 S. C. 255, 55 S. E. 529; see also 1 Daniel, *Neg. Inst.* (6th ed.) sec. 142. The principal case turns on the court's interpretation of the extent and purpose of such authority. It is clear that the accommodated party may fill in the name of a payee. N. I. L. sec. 14. He may also turn the instrument into "bearer" paper by filling in the word "bearer," the name of a fictitious payee, or in the absence of express prohibition, his own name. See 1 R. C. L. 1027; 1 Daniel, *Neg. Inst.* (6th ed.) sec. 145. In both instances the single aim is to procure negotiation. With such negotiation, therefore, all authority to alter ceases. *Builders' Lime Co. v. Welmer, supra.* And so, until the instrument by such negotiation becomes a note, the authority should continue. *Cf. Douglass v. Scott* (1837, Va.) 8 Leigh, 43 (change of date before negotiation). To hold that the authority is "exhausted" by inserting the name of a payee is to hold that failure of negotiation to that one payee will, contrary to the intention of all the parties, defeat the purpose for which the transaction was entered upon. It seems hardly open to question that the dissent in the principal case represents the sounder view.

CHARITABLE CORPORATIONS—LIABILITY FOR TORTS—ELEVATOR ACCIDENT IN BUILDING OPERATED FOR PROFIT.—The plaintiff's decedent was a tenant in an office building owned by Vanderbilt University and used in part for the accommodation of its law school but occupied chiefly by tenants to whom offices were rented. To a declaration charging that the tenant's death was caused by the negligence of an elevator operator employed by the defendant University a demurrer was interposed on the ground that being an eleemosynary institution it was immune from liability for the negligence of its agents. *Held,* that the defendant was liable, with a *dictum* that a judgment for the plaintiff would be collectible only from the income of the office building or other property of the defendant not used for educational purposes. *Gamble v. Vanderbilt University* (1918, Tenn.) 200 S. W. 510.

The case contains an admirable review of the various theories upon which different courts have rested the generally recognized exemption of charitable corporations from liability for the torts of their agents. See also (1917) 26 YALE LAW JOURNAL, 791; 5 R. C. L. 374. Tennessee had previously adopted the "trust fund theory," which bases the charity's immunity upon the ground

that the payment of damages for torts would divert trust funds from the purposes of the trust and would tend to discourage possible donors to charities, to the detriment of the public welfare. *Abston v. Waldon Academy* (1906) 118 Tenn. 24, 102 S. W. 351 (the plaintiff being a student in the defendant academy). A number of states explain the exemption on the theory that beneficiaries of the charity assume the risk of negligent injuries. *Powers v. Homeopathic Hospital* (1901, C. C. A. 1st) 109 Fed. 294; *cf. Paterlini v. Memorial Hospital* (1918, C. C. A. 3d) 247 Fed. 639. This theory, of course, permits recovery when the plaintiff, as in the principal case, does not belong to the class of persons who enjoy the benefits of the charity. *Bruce v. Central M. E. Church* (1907) 147 Mich. 230, 110 N. W. 951; *Hordern v. Salvation Army* (1910) 199 N. Y. 233, 92 N. E. 626; *Marble v. Nicholas Senn Hospital* (1918, Neb.) 167 N. W. 208. While rejecting these distinctions and adhering to their own doctrine founded on public policy, the court asserts that "public policy is not a thing inflexible" and that distinctions must be made from time to time as sound reason may dictate. Under the circumstances of the principal case, public policy is deemed to demand the imposition of liability. A few authorities in accord are cited in the opinion. *Winnemore v. Philadelphia* (1902) 18 Pa. Super. Ct. 625; *Holder v. Mass. Horticultural Soc.* (1912) 211 Mass. 370, 97 N. E. 630. It is submitted that the result of the decision is sound and in accord with modern tendencies to restrict the rule of general immunity of charities.

CONFLICT OF LAWS—JURISDICTION—DEGREE AFFECTING FOREIGN REALTY.—In a suit brought before the United States District Court for the Southern Division of the District of Idaho, against a Nevada corporation, the plaintiff charged the defendant with using excessive quantities of water for irrigation in Nevada from a river which also supplied the plaintiff further down stream in Idaho. The federal court ordered, (1) that the defendant should not use more than a stated quantity of water, (2) that it should place water meters on its Nevada land to register the amount taken, and, (3) that the plaintiff should have the privilege of going on that land for the purpose of inspecting the meters. The defendant appealed on the ground, among others, that the court had no jurisdiction to enter such a decree respecting foreign land. *Held,* that the decree below was correct. *Vineyard Land & Stock Co. v. Twin Falls Salmon River Land & Water Co.* (1917, C. C. A. 9th) 245 Fed. 9.

See COMMENTS, p. 946.

CONSTITUTIONAL LAW—ADMIRALTY—STATE WORKMEN'S COMPENSATION ACTS NOT APPLICABLE TO INJURIES WITHIN ADMIRALTY JURISDICTION—EFFECT OF AMENDMENT BY CONGRESS.—By consent or without objection from the respondents as to jurisdiction, the New York State Industrial Commission had made awards to employees in cases within the jurisdiction of admiralty, prior to the announcement of the decision in *Southern Pacific Company v. Jensen* (1917) 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, Ann. Cas. 1917 E 900, discussed in (1917) 27 YALE LAW JOURNAL, 255. *Held,* that, under that decision, such awards were invalid, and that they might now be set aside, since want of jurisdiction of the subject matter could not be waived; also that admiralty jurisdiction extended not only to repairmen working on a ship anchored in navigable waters, but also to dockworkers employed under maritime contracts. *Sullivan v. Hudson Nav. Co.* (1918, App. Div.) 169 N. Y. Supp. 645.

A stevedore was injured while assisting in unloading a vessel. On the authority of *Southern Pacific Company v. Jensen, supra,* it had been held that compensation could not be awarded under the Louisiana Compensation Act. On rehearing it appeared that meanwhile (Oct. 6, 1917) Congress had amended

the act dealing with the grant of admiralty jurisdiction to federal courts, and saving to suitors their common law remedies, by adding to it the words "and to claimants the rights and remedies under the compensation law of any state." 40 U. S. St. at L. 385. *Held,* that admiralty had no jurisdiction, since the stevedore was engaged in unloading, that *Southern Pacific Company v. Jensen* was distinguishable as a proceeding *in rem,* and that in any event the amendment applied and operated retroactively to permit the awarding of compensation. *Veasey v. Peters* (1917, La.; rehearing, 1918) 77 So. 948.

See COMMENTS, p. 924.

CONTRACTS—IMPOSSIBILITY OF PERFORMANCE—EFFECT OF GOVERNMENT ORDER SUSPENDING WORK.—The defendant contracted to construct a system of reservoirs to be completed within six years. Eighteen months after the work was begun the Minister of Munitions, acting under authority conferred by the Defence of the Realm Act, ordered the defendant to cease work and requisitioned his plant. The plaintiff sought a declaration by the court that this order was covered by a section of the contract which empowered the plaintiff's engineer to extend the time in case of any "difficulties, impediments, obstructions" or "oppositions" in the work, without affecting the obligation of the contract. *Held,* that the contract was dissolved by the order. *Metropolitan Water Board v. Dick, Kerr & Co.* (1917, H. of L.) 117 L. T. Rep. N. S. 766.

Following the rule stated in an oft repeated *dictum* in *Paradine v. Jane* (1647, K. B.) Aleyn 26, subsequent impossibility has been held not to discharge the promisor. *School District v. Dauchy* (1857) 25 Conn. 530. But an early exception to this rule was subsequent impossibility by action of the public authorities, through legislation or otherwise. *Baily v. De Crespigny* (1869) L. R. 4 Q. B. 180. The general rule was restricted further by readiness to imply a condition of the continued existence of some person or thing, as in *Taylor v. Caldwell* (1863, Q. B.) 3 B & S. 826; *Dexter v. Norton* (1871) 47 N. Y. 62. And with the implication of a condition to excuse performance where impossibility supervenes due to events that cannot be regarded as having been in the contemplation of the parties, the "rule" is practically destroyed. See *Baily v. De Crespigny, supra,* at p. 185; *Chicago, etc., Ry. Co. v. Hoyt* (1893) 149 U. S. 1, 14-15, 13 Sup. Ct. 779, 784; *Tamplin S. S. Co. v. Anglo-Mexican, etc., Co.* (H. of L.) [1916] 2 A. C. 397, 403-404. The result seems to be that the promisor is now held liable only when he expressly or by reasonable implication assumed the risk of the particular contingency which gives rise to the impossibility; but judges differ widely in their willingness to find such provision or implication. *Cf.* the opinions in the case last cited. In the principal case, however, the impossibility was only temporary. In such cases it has been held that the obligation is not discharged but at most is only suspended. *Baylies v. Fettyplace* (1811) 7 Mass. 325; *Tamplin S. S. Co. v. Anglo-Mexican, etc., Co., supra.* Here again, however, the modern tendency is to deal with each case on its own facts. It had been held in earlier English cases that a delay arising from a cause expressly excepted in the contract might be so long as to amount to a "frustration of the adventure," so that to require performance of the obligation after such an interval would be, not the enforcement of the original contract, but the substitution of a new one. *Geipel v. Smith* (1872, Q. B.) 26 L. T. Rep. N. S. 361; *Jackson v. Union Marine Ins. Co.* (1874, Ex. Ch.) L. R. 10 C. P. 125. The decision in the principal case applying the same doctrine to enforced suspension by compulsion of law seems a reasonable one. The difficulty of drawing the line, however, between those delays which are regarded as mere temporary interruptions, and those involving a "frustration of the adventure," is illustrated by a comparison of the principal case with the *Tamplin S. S. Co.* case, *supra.*

CONTRACTS—OFFER AND ACCEPTANCE—MISTAKE IN TRANSMISSION OF OFFER BY TELEGRAM.—The National Bank of Powell, Wyo., telegraphed to the plaintiff an offer to sell a car of potatoes at $1.35 per 100. Through a mistake in the transmission of the telegram it read when delivered: "Can furnish one car clean potatoes at *once* $.35 per 100 f. o. b. Powell." The plaintiff accepted the offer and the Wyoming bank shipped the potatoes. *Held,* that the sender of the telegram was bound by the message as delivered and that a contract was completed on the basis of $.35 per 100. *J. L. Price Brokerage Co. v. Chicago B. & Q. R. R. Co.* (1917, Mo. K. C. App.) 199 S. W. 732. See COMMENTS, p. 932.

CONTRACTS—PERSONAL SERVICE—GROUNDS FOR DISMISSAL.—The plaintiff, employed as superintendent of gas engine shops, absented himself for several days from his work, for "diversion strictly personal," at a time when his presence was needed for the completion of delayed orders. He was dismissed shortly after, and in the subsequent bankruptcy of his employer, filed a claim for damages accruing from the alleged breach of his employment contract. *Held,* that the claim could not be allowed because an employee's voluntary and unnecessary absence from duty at a time when his presence was necessary to the success of his employer's business was ground for discharge; and if such ground in fact existed it was immaterial whether it was assigned, or even known to the employer, at the time of the dismissal. *Farmer v. First Trust Company* (1917, C. C. A. 7th) 246 Fed. 671.

Any act or neglect by an employee which injures, or tends to injure, his employer's business, is ground for the employee's dismissal. *Deane v. Cutler* (1892, Buff. Super. Ct.) 20 N. Y. Supp. 617; *Kidd v. American Pill & Medicine Co.* (1894) 91 Ia. 261, 59 N. W. 41; *Pearce v. Foster* (1886, C. A.) 17 Q. B. D. 536. This doctrine also applies to those serving in a supervisory capacity. *Armour & Cudahy Packing Co. v. Hart* (1893) 36 Neb. 166, 54 N. W. 262; *Norton v. McMurtry* (1860, Exch.) 2 L. T. Rep. N. S. 297. Yet the tendency is not to hold this class of employees as strictly for their time as the clerk or common laborer. *Turner v. Kouwenhoven* (1885) 100 N. Y. 115, 2 N. E. 637; *Shaver v. Ingham* (1886) 58 Mich. 649, 26 N. W. 162. An employer is protected in dismissing an employee if a justification exists at the time, even though he does not state it, or know of its existence; and though he assigns another ground. *Green v. Edgar* (1880, N. Y. Sup. Ct.) 21 Hun 414; *Sterling Emery Wheel Co. v. Magee* (1890) 40 Ill. App. 340; *Baillie v. Kell* (1838, Eng. C. P.) 4 Bing. N. C. 638. Nor is the employer's motive of moment. *McKeithan v. Telegraph Co.* (1904) 136 N. C. 213, 48 S. E. 646; *Jackson v. New York Medical School* (1893, N. Y. C. P.) 6 Misc. 101, 26 N. Y. Supp. 27; *Boston Deep Sea Fishing Co. v. Ansell* (1888, C. A.) 39 Ch. Div. 339. Though practically all the cases raising the point relate to personal service, this would seem to be merely a sound application of the general doctrine of contracts, that a breach by one party releases the other from further performance. Conversely, of course, the discharge cannot be justified by acts or circumstances subsequently arising, for in such a case the employer, by the discharge, has committed the first breach. *Gerardo v. Brush* (1899) 120 Mich. 405, 79 N. W. 646. And a breach by the employee, as a ground of discharge, may be waived by condonation. *Spindel v. Cooper* (1905, N. Y. App. T.) 46 Misc. 569; 92 N. Y. Supp. 822. Two early Massachusetts cases indicate a contrary tendency, holding that a church or parish may justify the dismissal of its pastor only on those grounds which were alleged at the time of the dismissal. *Thompson v. Catholic Society* (1827, Mass.) 5 Pick. 469; *Whitmore v. Fourth Congregational Society* (1854, Mass.) 2 Gray, 306. These seem to be the only cases in America relating to the discharge of ministers; but they are so opposed to the current of authority as to warrant the expectation that even in Massachusetts they would now be over-

ruled or confined to their exact facts. Authority is lacking on the question of whether the servant, in his turn, could set up as a defence for abandonment, grounds not assigned when he left; but no reason appears why the doctrine should not be equally applicable to such a case. See Woods, *Master & Servant*, sec. 121; *Thayer v. Wadsworth* (1837, Mass.) 19 Pick. 349.

CRIMINAL LAW — CONSPIRACY — INDUCING RESISTANCE TO SELECTIVE DRAFT ACT.—The Act of Congress of June 15, 1917, known as the Espionage Act, provides in section 3 for the punishment of any person who, "when the United States is at war, shall willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States." The defendant was indicted under this provision for advising registrants under the Selective Draft Act not to report for duty when called. *Held*, that the words "military forces" in the above provision of the Espionage Act included those who had registered under the Selective Draft Act and had received serial numbers, though not yet called by the local exemption boards for examination, and that advising such persons not to report when called constituted a violation of section 3 of the Espionage Act. *United States v. Sugarman* (1917, D. Minn.) 245 Fed. 604.

Section 37 of the federal Criminal Code (Comp. St. 1916, sec. 10201) makes it an offense to "conspire . . . to commit any offense against the United States." Section 332 (Comp. St. 1916, sec. 10506) provides that "whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces or procures its commission, is a principal." Section 6 of the Selective Draft Act of May 18, 1917, makes it a misdemeanor for any person to "evade . . . the requirements of this Act." The defendants were indicted under these provisions for conspiring to induce persons not to register under the Selective Draft Act whose duty it was to do so. *Held*, that the conspiracy alleged was indictable under the sections above quoted. *Goldman v. United States* (1918) 38 Sup. Ct. 166.

There seems to have been an oversight on the part of Congress in failing to provide specifically in the Selective Draft Act for the offense of seeking to persuade another to evade or disobey the provisions of the Act. The attempt in the *Sugarman* case to bring this offense under the Espionage Act seems hardly sustainable. One wonders if the same court would hold that a registrant not yet called for examination who became intoxicated or committed a breach of the peace could be tried by court martial. The view taken by the court not only does violence to the natural meaning of words and to common sense, but is contradicted, at least by implication, by the Selective Draft Act itself, which distinguishes between registration and draft, and provides in section 2 that "all persons drafted into the service of the United States . . . shall, *from the date of said draft* . . . be subject to the laws and regulations governing the Regular Army." The decision in *United States v. Hall* (1918, D. Mont.) 248 Fed. 150, contrary to the *Sugarman* case, that "military or naval forces" in the Espionage Act means those organized and in service, is therefore to be commended.

The procedure adopted in the *Goldman* case to reach a similar offense rested on a sounder basis. At first sight it might seem that a distinction was overlooked between a conspiracy to do something and a conspiracy to induce another to do it. Chief Justice White's opinion does not help to clear up this difficulty, by paraphrasing the statute and speaking of a conspiracy "to *bring about* an illegal act." The real ground for sustaining the indictment was that, in the light of section 332, above quoted, the conspiracy contemplated the actual commission of a substantive offense against the United States by one or more of the conspirators. Under that section, not only the person persuaded not to

register, but also the person who persuaded him, would be guilty, as principal, of a violation of the criminal provisions of the Selective Draft Act. The same result had been reached on general principles of criminal law before section 332 was enacted. As applied to misdemeanors, that section is but declaratory of the general doctrine of the common law. See *United States v. Snyder* (1882, C. C. D. Minn.) 14 Fed. 554. And the resulting proposition that a conspiracy to persuade another to commit a misdemeanor against the United States necessarily involves a conspiracy to commit the same misdemeanor,—that is, to become liable to indictment as a joint principal in the offense which the other is persuaded to commit,—was clearly worked out by Judge Taft in *Toledo, etc., Railway Co. v. Pennsylvania Co.* (1893, C. C. N. D. Oh.) 54 Fed. 730, 735-737. While adequate for the *Goldman* case, this indirect method of reaching the offense of seeking to induce others to resist the draft would obviously fail when there was only a single offender and therefore no conspiracy; and this was probably the reason why the prosecution in the *Sugarman* case fell back on the Espionage Act. The *dicta* in *United States v. Baker* (1917, D. Md.) 247 Fed. 124, intimating that anything done with intent to procure the commission of an offense is necessarily indictable, would seem clearly unsound. *Cf.* the remarks about attempts in *United States v. Hall, supra,* at p. 153.

The omission to cover adequately this class of offenses has perhaps been cured by the Sedition Act, recently passed by Congress. According to newspaper reports, this Act provides for the punishment of any person who shall "cause or attempt to cause or incite or attempt to incite insubordination, disloyalty, mutiny or refusal of duty . . . or shall willfully utter, print, write or publish any language intended to incite, provoke or encourage resistance to the United States, or to promote the cause of its enemies." Part of this language is the same as that of the Espionage Act, as quoted above in the statement of the *Sugarman* case, but it will be noted that the limiting words, "in the military or naval forces of the United States," are omitted. Such general language leaves much to construction, but the provisions quoted would seem broad enough to cover inducing resistance to the draft, especially since, whatever may be their attitude in ordinary times, the courts in war time are evidently not disposed to any niceties of construction in passing on offenses which obstruct the war program.

EQUITY — INNOCENT MISREPRESENTATION — RECOVERY OF PROPERTY TRANSFERRED.—The defendant innocently made to the plaintiff misrepresentations of fact which led to a mutual exchange of corporate bonds. Plaintiff brought the present action to recover the bonds transferred to the defendant, offering to restore those received from the latter. *Held,* that plaintiff was entitled in equity to recover the bonds. *Bloomquist v. Farson* (1918, N. Y.) 118 N. E. 855. See COMMENTS, p. 929.

GIFTS—GIFT INTER VIVOS—DELIVERY OF UNENDORSED CERTIFICATE OF STOCK.—A mother handed her son, the defendant, a certificate of stock with words of gift, but without filling out the usual form of assignment and power of attorney on the back. In a subsequent will she bequeathed the stock to the plaintiff, who brought suit to recover the legacy. *Held,* that the prior transaction did not constitute a valid gift *inter vivos,* and that the plaintiff legatee was entitled to recover. *Heyer v. Sullivan* (1917, N. J. Ch.) 102 Atl. 249.

The court in the principal case followed without comment a previous New Jersey decision, *Matthews v. Hoagland* (1891, V. C.) 48 N. J. Eq. 455, 21 Atl. 1054; and see in accord, *Baltimore, etc., Co. v. Mali* (1886) 65 Md. 93, 3 Atl. 286. But these decisions are opposed to the great weight of authority in this

country. Marshall, *Corporations,* sec. 318; *Bond v. Bean* (1904) 72 N. H. 444, 57 Atl. 340; *Smith v. Meeker* (1912) 153 Iowa, 655, 133 N. W. 1058. The majority rule fits with the general American rule that delivery of the evidence of a chose in action, though without consideration, and without a written assignment, will constitute a valid gift *inter vivos* of the chose in action, if the delivery is made with that intent. *Grover v. Grover* (1837, Mass.) 24 Pick. 261 (negotiable note); *Meriden Savings Bank v. McCormack* (1906) 79 Conn. 260, 64 Atl. 338 (bank book); *Hani v. Germania Ins. Co.* (1900) 197 Pa. 276, 47 Atl. 200 (insurance policy). It has been said that the rule arose because our courts did not recognize the distinction made by the English courts in regard to choses in action between gifts *causa mortis* and gifts *inter vivos.* Oliver S. Rundell, *Gifts of Choses in Action* (1918) 27 YALE LAW JOURNAL, 643, 654; and see George P. Costigan, *Gifts inter Vivos of Choses in Action* (1911) 27 L. QUART. REV. 326. But whatever the origin of the rule, it is now based on the doctrine that since a chose in action is alienable at law as well as in equity, its transfer should be assimilated to that of interests in tangible chattels; hence that delivery of evidence of a chose in action—evidence received everywhere in the business world as practically the chose in action itself in tangible form—that such delivery made with intent to effect a gift of that chose, does constitute a valid gift *inter vivos.* Walter W. Cook, *The Alienability of Choses in Action* (1916) 29 HARV. L. REV. 816; and see *Editorial Note* (1918) 27 YALE LAW JOURNAL, 655, and cases there cited. And the fact is that the desirability of making shares of stock easily transferable has frequently caused the courts to treat stock certificates in other respects as possessing attributes of tangible property rather than as being merely evidence of choses in action. 1 Morawetz, *Corporations* (2d ed.) sec. 226; *Puget Sound Nat. Bank v. Mather* (1895) 60 Minn. 362, 62 N. W. 396; *Simpson v. Jersey City Contracting Co.* (1900) 165 N. Y. 193, 58 N. E. 896.

INSURANCE—CHANGE OF BENEFICIARY—EFFECT OF INSURED'S DEATH BEFORE ACTION BY INSURER.—In an insurance policy the power and privilege of changing the beneficiary were reserved. Such change was to be made "by written notice to the company at its home office, accompanied by the policy, and will take effect only when endorsed on this policy by the company." The insured made out a notice in writing, changing the beneficiary, and deposited it with his policy in the hands of the local agent of the company. The insured died suddenly, and thereafter the agent forwarded the papers to the home office and the change was duly endorsed on the policy. *Held,* that these facts operated to effect a change of beneficiary. *State Mutual Life Ass. Co. v. Bessett* (1918, R. I.) 102 Atl. 727.

The prevailing rule to-day is that the beneficiary has a vested right as soon as the policy is executed. This right, however, may be created subject to a power in the insured, or in the insured and insurer together, to change the beneficiary. The question is as to just what facts will operate legally as an exercise of this power,—a question to be answered by a fair construction of the terms of the insurance contract, involving both state statutes and company by-laws. If no special method of exercising the power is prescribed, any ordinary and reasonable method, such as a written notice by the insured, is sufficient. *Supreme Conclave v. Cappella* (1890, C. C. E. D. Mich.) 41 Fed. 1. See also *Ellis v. Fidelity Co.* (1913) 163 Iowa, 713, 144 N. W. 574 (changed by will). Where the method is prescribed, it must be substantially complied with. But where exact compliance with the prescribed method has been prevented by the beneficiary, the change is usually held to be complete. *Marsh v. Supreme Council* (1889) 149 Mass. 512, 21 N. E. 1070; *Hirschl v. Clark* (1890) 81 Iowa, 200, 47 N. W. 78. In many cases, the power is regarded as resting in the insured alone,

and it has been very generally held that an attempted change of beneficiary was effective when the insured had done "all that was required of him, or all possible for him to do" even though the company's action on his request took place after his death. *Mutual Life Co. v. Lowther* (1912) 22 Colo. App. 622, 126 Pac. 882; *Wandell v. Mystic Toilers* (1906) 130 Iowa, 639, 105 N. E. 448; *Grand Lodge v. McFadden* (1908) 213 Mo. 269, 111 S. W. 1172; *Luhrs v. Luhrs* (1890) 123 N. Y. 367, 25 N. E. 388. According to these cases the provision that the change is to "take effect only when endorsed on the policy by the company," or when some similar act is done, does not give the insurer the privilege of non-compliance with the insured's desire, but provides for a purely ministerial act, the performance of which could either be compelled by the new beneficiary or dispensed with altogether. There are some cases substantially in conflict with these, holding that where the insurer had not acted on the insured's request the change was not effective and could not be enforced. *Freund v. Freund* (1905) 218 Ill. 189, 75 N. E. 925; *O'Donnell v. Metropolitan L. Ins. Co.* (1915, Del.) 95 Atl. 289; *Sheppard v. Crowley* (1911) 61 Fla. 735, 55 So. 841. Even if an act of the insurer is one of the necessary operative acts to effect the change, and even if this act is discretionary with the insurer (i. e. he is privileged to do or not to do the act), there is no reason for requiring that act to be done prior to the death of the insured. The *power* in the insurer to effectuate the change comes from the original contract, to which the beneficiary's right is at all times subject, and the later action of the insured would seem to be merely a condition to the exercise of this power. Therefore the death of the insured after having fully performed the condition should not revoke the power of the insurer, even though the insured might possibly have revoked it by a voluntary act while living. *Luhrs v. Luhrs* (1890) 123 N. Y. 367, 25 N. E. 388 (*semble*). It necessarily follows, however, from the recognition of a discretionary power in the insurer, that there is no change of beneficiary if the company in its discretion refuses to do the necessary operative act, and this is true whether the insured is living or dead. *Freund v. Freund, supra.* And the contract may, of course, expressly confine the power of the insurer to acts performed prior to the death of insured. *Modern Woodmen v. Headle* (1914) 88 Vt. 37, 90 Atl. 893.

JUDGMENTS—EQUITABLE RELIEF—DEFENSE PREVENTED BY FAILURE TO RECEIVE SUMMONS.—A son forged his mother's signature to a note. In a suit upon the note summons was served at the mother's former residence (where she no longer resided) by delivery to the son, who concealed it from his mother. At the trial he appeared and testified to the genuineness of his mother's signature, and judgment was rendered against her. As the statutory period of 30 days for setting aside a judgment had expired, the trial court denied relief. The mother sued in equity for an injunction against enforcement of the judgment. *Held,* that proceedings on the judgment should be perpetually stayed unless the defendants should agree to a new trial. *Yung v. Roll Stickley & Sons* (1917, N. J. Eq.) 102 Atl. 698.

By rather labored reasoning the court construed this as a case of "accident," justifying equitable relief on that ground. No such straining of language would seem to be necessary. The objection to the validity of the judgment was the more fundamental one that the court had never acquired, by proper service, any jurisdiction over the judgment defendant. But though the judgment was void, there was no procedure at law to set it aside after the thirty days, and the aid of equity was therefore necessary to stop the machinery of enforcement. It is well settled that where, in an action depending on personal service to give jurisdiction, notice was not properly served upon the defendant, equity will enjoin enforcement of a judgment. *Jones v. Commercial Bank* (1840, Miss.)

5 How. 43 (defendant absent from residence); 2 Pomeroy, *Eq. Remedies,* sec. 663. This rule is of course subject to the usual qualification that equity will act only when common law procedure affords no adequate remedy. *Knight v. Creswell* (1907) 82 Ark. 330, 101 S. W. 754. Where the record at law is regular on its face, there is a conflict of authority as to whether a meritorious defense must be shown before an injunction will be granted. The majority rule seems to require such a showing. *Jeffery v. Fitch* (1879) 46 Conn. 601; *Bernhard v. Idaho Bk.* (1912) 21 Idaho 598, 123 Pac. 481; *contra, Cooley v. Barker* (1904) 122 Iowa 440, 98 N. W. 289. The persuasive argument of the minority is that the complainant is deprived of his property without due process of law, and on this ground an injunction should be granted independently of any other consideration. 2 Pomeroy, *Eq. Remedies,* sec. 667. But it would seem that the hearing before the court of equity would give him his day in court. In the principal case there was no difficulty on this point, as the facts alleged showed a complete defense to any liability on the note. Nor is it any bar to equitable relief in such cases that the plaintiff at law was innocent of any wrongdoing or unfairness. *Jeffery v. Fitch, supra;* 2 Pomeroy, *Eq. Remedies,* sec. 663.

JUDGMENTS — PERSONS CONCLUDED — RIGHTS OF ABSENTEE PRESUMED TO BE DEAD.—The defendant was the depositary of an employees' savings fund. The particular deposit in question was payable upon the death of the depositor to his sons or, if they were not living, to his legal representatives. His executrix demanded payment, the sons having been absent and unheard of for 18 years. From a judgment for the plaintiff the defendant appealed on the ground that such judgment would not protect it from having to pay again to the sons, should they subsequently appear. *Held,* that the judgment for the plaintiff was correct, with a *dictum* that payment thereunder would protect the defendant. *Maley v. Pennsylvania R. R. Co.* (1917, Pa.) 101 Atl. 911.

See COMMENTS, p. 943.

NEGLIGENCE—ACTING IN EMERGENCY.—The defendant company in constructing a dam pumped water into a chute whence it was discharged into the river causing a swift current. The deceased, an employee of the defendant and an expert swimmer, fell into the chute, was carried into the river and was drowned. In a suit for wrongfully causing his death, the negligence complained of was that a fellow employee attempted to give aid to the deceased instead of immediately stopping the pumps and thus abating the current. *Held,* that a verdict for the defendant was properly directed. *Kelch's Adm'r v. National Contract Co.* (1918, Ky.) 199 S. W. 796.

Negligence is a relative term dependent upon the circumstances under which one acts or fails to act. In an emergency, one who acts according to his best judgment, even though the event proves that he failed to choose the most judicious course, is not chargeable with negligence. Such act or omission may be called a mistake but not carelessness. *Brown v. French* (1883) 104 Pa. 604; *Floyd v. Philadelphia R. R. Co.* (1894) 162 Pa. 29, 29 Atl. 396. The question usually arises in cases where the defendant seeks to escape liability on the ground that the injured plaintiff was guilty of contributory negligence in choosing the wrong way to protect himself from the impending danger. See *Geary v. McCreary* (1912) 147 Ky. 254, 143 S. W. 1004. *Dicta* in certain Iowa cases seem to indicate a tendency to confine the emergency rule to such situations. See *Boice v. Des Moines City Ry. Co.* (1911) 153 Iowa 472, 477; 133 N. W. 657, 659. But other courts have applied the rule to defendants acting with mistaken judgment in an emergency which they have not caused. *Sekerak v. Jutte* (1893) 153 Pa. 117, 25 Atl. 994. It is submitted there is no sound basis for limiting the rule to the defence of contributory negligence. The effect of

an emergency in depriving a person of time for calculated consideration is the same whether he be the one in danger or the one whose duty it is to avoid the threatened injury. The principal case correctly holds that the law of negligence does not and should not require mathematical accuracy or conduct of exact calculation in emergencies whatever the relation of the person to the event. See *Wise Ter. Co. v. McCormick* (1905) 104 Va. 400, 414, 51 S. E. 731, 736.

NEGLIGENCE—ASSUMPTION OF RISK—VOLUNTEER REMOVING ELECTRIC WIRE FROM PUBLIC STREET.—A broken telephone wire of the defendant company became charged with electricity by contact with a wire of the city lighting system. The plaintiff's decedent, a volunteer, received a fatal shock while attempting to remove the broken wire from the street in order to avert possible injury to passers-by. His administratrix sued the defendant for negligently causing his death. Judgment was rendered for the plaintiff. *Held,* that the judgment was correct. Hamer, J., *dissenting. Workman v. Lincoln Tel. & Tel. Co.* (1918, Neb.) 166 N. W. 550.

The defendant's negligence being established by the verdict of the jury, the decision turns upon the effect of the plaintiff's assumption of risk. In actions of this type assumption of risk will bar recovery unless sufficient justification is found for the plaintiff's assuming it. Protection of one's own property is held to be such a justification; as where one was injured in attempting to remove a sputtering wire which endangered his property. *Leavenworth Coal Co. v. Ratchford* (1897) 5 Kan. App. 150, 48 Pac. 927. But this principle does not apply where it was not the wire which brought danger to the property, but the location of the property, or the owner's desire to make a given use of it, which brought the plaintiff into danger. *State v. Chesapeake & Potomac Tel. Co.* (1914) 123 Md. 120, 91 Atl. 149 (climbing telegraph pole to rescue a pet cat); *Hickok v. Auburn Light, etc., Co.* (1911) 200 N. Y. 464, 93 N. E. 1113 (climbing pole to put new bulb into a light). Under certain conditions the plaintiff can also find justification in his intention to prevent injury to persons. So with a foreman, not employed by the defendant, killed while attempting by removal of the defendant's dangling live wire to prevent possible injury to his fellow-workers. *New England Tel. & Tel. Co. v. Moore* (1910, C. C. A. 1st) 179 Fed. 364. So also with a policeman, whose duty it is to protect the public. *Bourget v. Cambridge* (1892) 156 Mass. 391, 31 N. E. 390; *Dillon v. Allegheny, etc., Co.* (1897) 179 Pa. 482, 36 Atl. 164. The principal case is novel in that it seems to be the first in which recovery was allowed in the given situation for injuries sustained by an ordinary member of the public, acting only from public spirit. With this principle the dissenting opinion may perhaps be reconciled, and the dissent rested on the ground that the decedent was not reasonably prudent in his choice of means. Of course recovery is properly barred where the risk is taken in acts which have no reasonable relation to the protection of property or persons, such as touching wires to show that they are harmless. *Carroll v. Grande Ronde Electric Co.* (1906) 47 Ore. 424, 84 Pac. 389; *Anderson v. Jersey City Electric Co.* (1900, Ct. Err.) 64 N. J. L. 664, 46 Atl. 593. And it may be suggested that the evil sought to be avoided might be required to bear some proportion to the apparent risk. For a further note on the liability of tort feasors to volunteers, see 27 YALE LAW JOURNAL, 415.

REMOVAL OF CAUSES—RESIDENCE OF PARTIES—PLAINTIFF A RESIDENT OF STATE BUT NOT OF DISTRICT IN WHICH SUIT IS BROUGHT.—Two citizens of Alabama, one residing in the Middle District and the other in the Southern District, sued a Louisiana corporation in a state court in the Southern District of Alabama. *Held,* that the defendant might remove the cause to the federal district court

for the district within which the suit was pending. *M. Hohenberg & Co. v. Mobile Liners. Inc.* (1917, S. D. Ala.) 245 Fed. 169.

See COMMENTS, p. 935.

SALES—BILLS OF LADING—RESERVATION OF TITLE.—The National Bank of Powell, Wyo., telegraphed to the plaintiff an offer to sell a car of potatoes at $1.35 per 100. Through a mistake in the transmission of the telegram it read when delivered: "Can furnish one car clean potatoes at *once* $.35 per 100 f. o. b. Powell." The plaintiff accepted the offer and the Wyoming bank shipped the potatoes, sending a bill of lading to a bank at St. Joseph, Mo., with draft attached for the amount of the sale at $1.35 per 100. The plaintiff tendered the amount due on a 35¢ basis both to the St. Joseph bank and to the carrier. Being unable to obtain possession of the shipment the plaintiff brought replevin against the railroad company. *Held,* that upon tender of the price according to the contract, the title and right to possession passed to the plaintiff, and that the action could be maintained. *J. L. Price Brokerage Co. v. Chicago B. & Q. R. R. Co.* (1917, Mo. K. C. App.) 199 S. W. 732. See COMMENTS, p. 932.

SALES—WARRANTIES—IMPLIED WARRANTY OF WHOLESOMENESS OF FOOD.—The plaintiff purchased and ate at the defendant's drug store ice cream manufactured by the defendant. In an action for damages for illness caused by the presence in the cream of tyrotoxican, a filth product, the trial court charged that the defendant impliedly warranted the cream wholesome and fit to eat. *Held,* that the instruction was correct. *Race v. Krum* (1918, N. Y.) 118 N. E. 853.

See COMMENTS, next month.

TORTS—ENTICING AWAY PLAINTIFF'S EMPLOYEE—JUSTIFICATION.—The defendant corporation induced an employee of the plaintiff corporation to leave the plaintiff in order to enter the service of the defendant. Under his contract with the plaintiff the employee in question was under no duty to remain. The plaintiff sought an injunction. *Held,* that the defendant had committed no legal wrong and that an injunction should be denied. *Triangle Film Corporation v. Artcraft Pictures Corporation* (1918, C. C. A. 2d) 59 N. Y. L. J. 283.

In spite of the *dictum* of Pitney, J., to the contrary in *Hitchman Coal & Coke Co. v. Mitchell* (1917) 38 Sup. Ct. 65 (commented on in [1918] *27* YALE LAW JOURNAL, 794-795), the decision in the principal case seems both sensible and sound. As Learned Hand, J., says in the course of his brief but illuminating discussion, "the result of the contrary would be intolerable both to such employers as could use the employee more effectively and to such employees as might receive added pay. It would put an end to any kind of competition." The learned court felt the contention of the plaintiff to be "so extraordinary" that it refused "to consider it at large" and apparently deemed it unnecessary to cite authorities. Actual decisions upon the point are in fact not numerous. See (1918) *27* YALE LAW JOURNAL, 794. The opinion of the court in the principal case is to be commended for its frank recognition that the decision really involved a determination of policy, viz., what shall be recognized as "just cause" for intentionally interfering with the "status" of employer and employee which existed between the plaintiff and the person induced to leave.

TORTS—NEGLIGENCE—LIABILITY OF CONTRACTOR TO THIRD PARTY.—The defendant corporation constructed a highway bridge under contract with county commissioners. Some years after the bridge had been accepted by the county, the appellant's decedent sustained fatal injuries from its collapse due, as the plaintiff alleged, to negligence in its construction. *Held,* that the complaint stated a good

cause of action. *Travis v. Rochester Bridge Co.* (1918, Ind. App.) 118 N. E. 694.

This case calls attention to the gradual passing of the old rule that a contractor is not liable to indeterminate third parties for injuries caused by defective construction because there is no privity of contract between them. See *Winterbottom v. Wright* (1842, Exch.) 10 M. & W. 109. The first departure from the old rule was made in the case of articles inherently dangerous to life or health. *Thomas v. Winchester* (1852) 6 N. Y. 397 (poison wrongly labelled). The character of the article imposed upon the maker a positive duty of care—a tort duty—not to deal with it so as to cause harm to any person who might reasonably be expected to use it; the lack of privity of contract could be no defense to a violation of this duty. *Waters-Pierce Oil Co. v. Deselms* (1908) 212 U. S. 159, 29 Sup. Ct. 270. Some courts extend the duty of care to include cases where the instrumentality was not dangerous in itself but was made so by defective construction. *Huset v. Case Threshing Machine Co.* (1903, C. C. A. 8th) 120 Fed. 865; *MacPherson v. Buick Co.* (1916) 217 N. Y. 382, 111 N. E. 1050; see also (1916) 25 YALE LAW JOURNAL, 679. But many courts have refused to go so far. Some hark back to the old and pointless objection of lack of privity, as though the sole liability were in contract for breach of implied warranty, and not equally in tort. See *Cadillac Co. v. Johnson* (1915, C. C. A. 2d) 221 Fed. 801. Other courts have argued that the doctrine would create a liability so indefinite as to expose industry to ruin through litigation. *Curtin v. Somerset* (1891) 140 Pa. 70, 21 Atl. 244. Indefiniteness, if an objection, would apply to any tort duty; the conclusion drawn from it seems to represent a mistaken view of fact and policy—it presupposes a prevalence of negligence which, if it exists, can best be remedied by making such negligence expensive. On the relation of the doctrine here discussed with that of liability for breach of warranty by a vendor, see p. 961, *supra*. As in the principal case, bridge contractors have been held liable for injuries caused to the traveling public by negligent construction, but the cases have always, so far as discovered, laid emphasis upon the fact that the defects in construction were known to the defendant and were concealed from the other contracting party as well as from the public. *O'Brien v. American Bridge Co.* (1910) 110 Minn. 364, 125 N. W. 1012. Whether there would be liability if the contractor had faithfully performed his contract and the injury were due merely to a defect in the plans which the contractor ought to have recognized as creating a structure dangerous to the public is a question which the principal case suggests but does not decide. Nor does it at all discuss the question of the defendant's knowledge of the defect: the case came up on demurrer to a complaint in which actual knowledge was alleged. Such actual knowledge is held in one group of cases essential to the defendant's liability. *Schubert v. Clark* (1892) 49 Minn. 331, 51 N. W. 1103; *Earl v. Lubbock* [1905] 1 K. B. 253. A second group holds "imputed" knowledge to be sufficient, but only when the circumstances are such as to warrant a jury in finding that the defendant *must have known* of the defect. *O'Brien v. American Bridge Co., supra*. Courts which follow this theory deny the defendant's liability where he only "should have known" or "ought to have known." *Wood v. Sloan* (1915) 20 N. M. 127, 148 P. 507. A third group holds that if the defendant *should have known*, he cannot escape because he did not know. *MacPherson v. Buick Co., supra*. The last rule, applying a purely objective test, seems to be more in accord with the general principles of tort liability.

TRADE-MARKS—APPLICATION TO DIFFERENT GOODS OF SAME CLASS.—The plaintiff was the registered owner of the trade-mark "Old Crow" which it had always applied to its straight rye and bourbon whiskey. It sought an injunction against the defendant's use of the same trade-mark on the defendant's straight

whiskeys. The defendant pleaded a prior adjudication to the effect that the defendant had first appropriated the trade-mark "Old Crow" to designate its *blended* whiskey, although by *laches* it had lost its exclusive rights in this name as against the plaintiff. *Held,* that by virtue of prior appropriation of the trade-mark for blended whiskey the defendant was privileged to use it also for straight whiskey. *Rock Spring Distilling Co. v. Gaines & Co.* (1918, U. S.) 38 Sup. Ct. 327.

The gist of the wrong of unfair competition in trade-mark cases is the probability that the public may be led to mistake the defendant's goods for those of the plaintiff. *Amoskeag Mfg. Co. v. Garner* (1876, N. Y. Sup. Ct.) 54 How. Prac. 297. The test applied by the courts to determine such probability is free of fine distinctions; it is the care exercised by the average buyer of that particular class of goods. *Bass, Ratcliff & Gretton v. Feigenspan* (1899, C. C. D. N. J.) 96 Fed. 206. *Rushmore v. Badger Brass Mfg. Co.* (1912, C. C. A. 2d) 198 Fed. 379. It follows that the right to the exclusive use of a given trade-mark may be restricted to its use on a particular class of goods, and the use of the same mark by another permitted in connection with a different class. *Virginia Baking Co. v. Southern Biscuit Works* (1910) 111 Va. 227, 68 S. E. 261 (soda crackers and ginger snaps; the propriety of putting them in separate classes may, however, be doubted). But within its own class the trade-mark will be protected by injunction. As the court says, great confusion would arise in business from recognizing the same trade-mark as belonging to different persons for different kinds of the same article. Authorities in the lower courts accord: *American Tobacco Co. v. Polacsek* (1909, C. C. S. D. N. Y.) 170 Fed. 117 (smoking tobacco and cigarettes); *Collins Co. v. Oliver Ames Corp.* (1882, C. C. S. D. N. Y.) 18 Fed. 561; (axes, etc., and spades) *G. G. White Co. v. Miller* (1892, C. C. D. Mass.) 50 Fed. 277 (straight and blended whiskey); *Layton Pure Food Co. v. Church & Dwight Co.* (1910, C. C. A. 8th) 182 Fed. 35 (baking powder and baking soda). See also (1911) 30 L. R. A. (N. S.) 167. It is, however, possible as in the principal case that a prior appropriator may by *laches* lose his exclusive right against all competitors and as far as the other party to the suit is concerned, have merely a privilege or as the case calls it, a "defensive right" to use the mark. The cases on the main point of the instant case, though not numerous, are in agreement.

TRADING WITH THE ENEMY—CONTRACTS CONFERRING PECUNIARY ADVANTAGE ON CITIZEN.—In August, 1915, the defendants, D & Co., a French firm, sold to the plaintiff, Y, a subject of Bulgaria resident in Marseilles, a quantity of wheat to arrive. By the French law of September 27, 1914, the performance of any contract between a German or Austrian and a Frenchman, operating to the advantage of the German or Austrian, was declared null and void, which provision of law was extended to subjects of Bulgaria by decree of November 7, 1915. When the wheat arrived this decree was in force, on which ground the defendants refused to make delivery to the plaintiff. The plaintiff had in the meantime resold much of the wheat to French individuals at a loss. Examination of the terms of the contract and of the interests of the various parties under it showed that it operated to the decided advantage of Frenchmen and to the disadvantage of the plaintiff. *Held,* that the defendants should be ordered to make delivery to the plaintiff. *Yulzari v. Dreyfus,* Tribunal de Commerce of Marseilles, Nov. 16, 1915, reported in (1917) 44 CLUNET, 1015.

The case illustrates two striking differences between the French and the Anglo-American law. (1) The plaintiff, although resident in France, was regarded as an alien enemy, the test of nationality determining enemy character for trading purposes. The Anglo-American test of domicil would have relieved the plaintiff from this status. His permission to sue in France is attributable

to the special privilege in this respect extended to Bulgarians for political reasons. (2) Under the French law, not all contracts between alien enemies appear to be void and non-executable, but only such as are of pecuniary profit to the enemy. This requires the court to examine the benefits to be derived from the operation of such a contract. Although in this case the court found that the plaintiff would sustain a loss and Frenchmen derive a profit from the enforcement of this contract, it is not explained why the plaintiff sued at all. *Quaere,* whether the court would examine comparative advantages, and follow the test of preponderating advantage. Under Anglo-American law, the contract would be absolutely void, if made between alien enemies in the Anglo-American sense, regardless of the question of benefits. The consideration of "benefit to the subject" is applied in another connection, namely, in aid of the rule that alien enemies are not relieved from suit in the courts at the hands of subject plaintiffs. *Porter v. Freudenberg* (C. A.) [1915] 1 K. B. 857. *Cf.* also *Ertel Bieber & Co. v. Rio Tinto Co.* (H. of L.) [1918] A. C. 260.

TRUSTS—CONSTRUCTIVE TRUST—MURDER OF TENANT BY ENTIRETY BY CO-TENANT WITHOUT INTENTION TO PROFIT BY HIS CRIME.—A husband and wife held real estate as tenants by the entirety. The husband murdered his wife and then committed suicide. It was shown that he committed the crime without any intention of acquiring title as surviving tenant by the entirety. The executor and heirs of the wife filed a bill in equity to quiet their title against the administrator and heirs of the husband. *Held,* that the plaintiffs were entitled to the relief prayed for. *Van Alstyne v. Tuffy* (1918, N. Y. Trial T.) 9 Rochester-Syracuse Daily Record, 44.

When a prospective heir murders his ancestor, or when a devisee or legatee murders his testator, a problem arises upon which the courts have taken divergent views. By legislation the murderer may, as part of the penalty for his crime, be deprived of the privilege of inheritance. *Estate of Donnelly* (1899) 125 Cal. 417, 58 Pac. 61. In the absence of legislation three views are possible. (1) The murderer may be given title on the ground that the courts are powerless to read into the statute of descent or into the will an exception excluding him. Although the result shocks one's sense of justice, this view is supported by the weight of authority. *Wall v. Pfanschmidt* (1914) 265 Ill. 180, 106 N. E. 785. (2) The opposite view, sustained by a few courts, excludes the murderer from taking title, on the ground that the statute of descent or the will must be read in the light of public policy, which forbids a person to profit by his own crime. *Perry v. Strawbridge* (1908) 209 Mo. 621, 108 S. W. 641. (3) The third view, based on principles of constructive trusts, prevails in New York and a few other jurisdictions. Legal title is recognized as passing to the murderer, but on equitable principles a trust is raised in favor of the heirs of the person murdered. *Ellerson v. Westcott* (1896) 148 N. Y. 149, 42 N. E. 540, explaining *Riggs v. Palmer* (1889) 115 N. Y. 506, 22 N. E. 188; *Cleaver v. Mutual Reserve, etc., Assn.* (C. A.) [1892] 1 Q. B. 147. This view, it is submitted, accomplishes justice without judicial legislation and in accordance with recognized principles. It also enables a *bona fide* purchaser from the murderer to be protected in his title. The principal case is a logical extension of the New York rule. It is worthy of note in that it applies the constructive trust principle to the innocent heirs of the wrongdoer, and this regardless of the motives of the murderer in committing the crime. On the latter point *cf. Hall v. Knight* (C. A.) [1914] P. 1 (a recent English case excluding from succession under a will a devisee convicted of manslaughter in killing the testator). Only one other case dealing with estates by entireties in this connection seems to have been decided. *Beddingfield v. Estill* (1907) 118 Tenn. 39, 100 S. W. 108. There an opposite result was reached on the ground that in an estate by the entirety the surviving

spouse does not take by inheritance but as survivor by virtue of the original grant. But this is no adequate reason for refusing to apply the equitable principles above discussed. See (1897) 36 AM. L. REG. (N. S.) 225, 237.

WATERS AND WATERCOURSES—OBSTRUCTING NATURAL STREAM—EXTRAORDINARY RAIN AS ACT OF GOD.—The defendant enclosed in culverts a stream flowing through its land. As the result of an unprecedented storm the culverts proved insufficient, and overflowing water damaged the plaintiff's property. In its natural condition the channel would have been sufficient to carry off the flood. *Held,* that the defendant was liable, some of the opinions resting on the ground that an extraordinary rainfall in Scotland was not to be deemed an act of God, and one at least on the ground that one who substitutes an artificial watercourse for a natural one is absolutely responsible for damage caused by any flood which would have passed safely through the natural channel. *Corporation of Greenock v. Caledonian Railway Co.* (1917, H. of L.) 117 L. T. Rep. N. S. 483.

Persons who obstruct the natural flow of a stream will in general be liable for damage by overflow caused by the obstruction. *McCoy v. Danley* (1852) 20 Pa. 85, 57 Am. Dec. 680. But it is commonly said that for damage due to such an unwonted flood as may be deemed an act of God, the defendant will be absolved from liability. *Dorman v. Ames* (1867) 12 Minn. 451. When a flood may be so deemed is a question to which it is difficult to find a definite answer in the decisions. Of course one who artificially changes a watercourse must build to accommodate all the water which can be anticipated under the circumstances, having in view the climate, topography, etc. *Sabine v. Johnson* (1874) 35 Wis. 185. Thus when the stream had previously several times overflowed its banks, it was held not enough to accommodate only the water that would flow within the natural bed and banks. *Dunn v. Chicago, etc., Ry. Co.* (1917, Ind. App.) 114 N. E. 888. While each decision in this field must necessarily depend on its own peculiar facts, it would seem that the principal case illustrates a tendency of the courts of Great Britain to be rather less willing than are American courts to find an act of God in given circumstances. *Cf. Kerr v. Earl of Orkney* (1857, Scot. Ct. Sess.) 20 Dunlop, 298; *Dorman v. Ames, supra; Helbling v. Allegheny Cemetry Co.* (1902) 201 Pa. 171, 50 Atl. 970. Indeed, Lord Wrenbury's opinion indicates that, in his view at least, no storm, however extraordinary and unforeseeable, would excuse the defendant if the natural channel would have been sufficient to carry off the flood. The case is also interesting for the comments of the Lords Justices upon *Nichols v. Marsland* (1876, C. A.) 2 Ex. Div. 1, in which the act of God exception to the *Rylands v. Fletcher* doctrine was established.

WORKMEN'S COMPENSATION ACT—INJURY ARISING "OUT OF" THE EMPLOYMENT—ASSAULT BY FELLOW-EMPLOYEE.—The claimant's intestate, an employee of the defendant company, died as a result of injuries received in a fight following an assault upon him by a fellow-employee, arising out of a controversy over the possession of a ladle. It was the policy of the defendant company in making iron castings to furnish their employees with only a limited number of ladles so as to avoid too much crowding of the casters around the cupola where the molten metal was drawn out, and so as to prevent them from finishing their day's work too early. *Held,* that the injury did not arise "out of" the employment. *Jacquemin v. Turner & Seymour Mfg. Co.* (1918, Conn.) 103 Atl. 115.

An injury resulting directly from a wilfully tortious or sportive act of a fellow-employee who departs temporarily from the scope of his employment to conduct himself in this manner is not generally held to be within that class of injuries for which the legislatures have provided compensation. (1917) 27 YALE LAW JOURNAL, 142; Kiser, *Workmen's Compensation Acts,* 79; *Federal*

Rubber Mfg. Co. v. Havolic (1916) 162 Wis. 341, 156 N. W. 143; *Pierce v. Boyer, etc. Coal Co.* (1916) 99 Neb. 321, 156 N. W. 509. An injury resulting indirectly from such an act is within the compensable class. *Knopp v. American Car & Foundry Co.* (1914) 186 Ill. App. 605. However, the general rule has been narrowed by exceptions. Where the nature of the employment peculiarly exposes the employee to the risk of such injuries, an injured employee is entitled to compensation. *Polar Ice & Fuel Co. v. Mulray* (1918, Ind. App.) 119 N. E. 149 (shooting of a servant employed to check and collect for shortages of other servants); *State v. District Court* (1916) 134 Minn. 16, 158 N. W. 713. And when the fellow-employee is in the habit of conducting himself in a manner dangerous to his fellows, it is held that the injury arises "out of" the employment, as resulting from a risk incidental to the conditions under which the employee must work. *In Re Loper* (1917, Ind. App.) 116 N. E. 324; *McNicol's Case* (1913) 215 Mass. 497, 102 N. E. 697. But, for recovery in such a case, it must appear that the employer had knowledge of the danger. *Schmoll v. Weisbrod & Hess Brewing Co.* (1916, Sup. Ct.) 89 N. J. L. 150, 97 Atl. 723; *Stuart v. Kansas City* (1918, Kan.) 171 Pac. 913. Under this subjective test it would seem that, as with the dog-bite *scienter*, the first injury caused by a given employee to another is not compensable, even though the second one might be. But see *M'Intyre v. Rodger & Co.* (1903, Ct. Sess.) 41 Scot L. Rep. 107; *Heitz v. Ruppert* (1916) 218 N. Y. 148, 112 N. E. 750. There seems to be no reason to doubt either the holding in the principal case, or its suggestion that notice of a tendency in the conditions or the men to cause trouble would be enough to charge the employer although no actual injury had previously resulted.